Taib v. *Public Prosecutor* as to the effect of section 2(1) of the Criminal Justice Ordinance, 1953. That section reads as follows:—

"No person shall be sentenced by a Court to penal servitude; and every law conferring power on a Court to pass a sentence of penal servitude in any case shall be construed as conferring power to pass a sentence of imprisonment for a term not exceeding the maximum term of penal servitude for which a sentence could have been passed in that case immediately before the commencement of this Ordinance."

The judgment of Spencer Wilkinson J. was a considered judgment. The judgment of Neal J. was an oral judgment. *Chan Choon Weng's* case was decided in 1956, three years after the bringing into force of the Criminal Justice Ordinance, 1953, and it is quite clear from the wording that Spencer Wilkinson J. had considered the effect of section 2 of the Criminal Justice Ordinance, 1953, and he had interpreted it as the learned Deputy Public Prosecutor in *Ad'at's* case asked the learned judge to interpret it as meaning that when the words "penal servitude for life" appear in the Criminal Procedure Code they must be interpreted as meaning "imprisonment for life". With that view I respectfully agree and with great respect to Neal J. I find I am unable to accept his argument that this is not so. It is true that the legislature found it specifically necessary to amend section 301 of the Criminal Procedure Code by section 5 of the Criminal Justice Ordinance. But it was specifically necessary to amend section 301 of the Criminal Procedure Code because that section originally read as follows:—

"The Resident of the State in which the offence was committed may, with the consent of the Ruler of that State and without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it—

(a) Death;

(b) Penal servitude;

(c) Rigorous imprisonment for a term not exceeding that to which he might have been sentenced;

(d) Simple imprisonment for a like term;

(e) Fine."

It was clearly neater and in the interest of clarity to amend the section so that it reads as it does at present:

"The Ruler of the State acting in accordance with the provisions of Article 42 of the Constitution in which the offence was committed may, without the consent of the person sentenced, commute any one of the following sentence for any other mentioned after it—

(a) Death;

(b) Imprisonment;

(c) Fine."

But it was also necessary to do so because section 2 of the Criminal Justice Ordinance specifically refers to the conferring of a power on the court, whereas section 301 of the Criminal Procedure Code conferred the power on the Ruler. Section 301 therefore had to be amended, but this does not mean that "Penal Servitude" in section 388(1) should not be read in effect as "imprisonment for life". The relevant wording of section 388(1) reads: ". . . . . shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with . . . . . penal servitude for life". But this punishment is a power conferred upon the court to award, and therefore must be construed to be, in my view, after the passing of the Criminal Justice Ordinance, 1953, as "imprisonment for life".

In my view, therefore, following Spencer Wilkinson J., I do not consider that there is any power for the magistrate to grant bail in cases punishable with death or imprisonment for life. Therefore, the learned magistrate was unable and had no power to grant bail in this present case. But even if I am wrong and the effect of section 2 of the Criminal Justice Ordinance, 1953, is to permit in proper cases persons to be released on bail in all non-bailable cases other than those punishable with death, then I would hold that the learned magistrate has considered the matter judicially, exercised his discretion judicially and has come to a decision which I consider is a proper one. It has long been established that once the magistrate has properly exercised his discretion it is not for an appellate Court to interfere with it.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Battenberg & Talma.*

IBRAHIM v. PUBLIC PROSECUTOR

[A. Cr. J. (Hashim J.) March 19, 1962]

[Kuantan — Criminal Appeal No. 1 of 1962]

Evidence — Onus on prosecution to prove its case — When defence to be called — Criminal Procedure Code (Cap. 6), s.173(f).

The defence should not be called where the prosecution has failed to prove its case. Under no circumstances should a Magistrate call for the defence merely to clear any doubt he may have in his mind as to whether the prosecution had or had not proved its case.

CRIMINAL APPEAL.

V. C. George for the appellant.

Sheikh Abdul Rahman bin Abu Bakar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Hashim J.: The appellant was charged for driving a motor lorry without due care and attention. He was found guilty, convicted and sentenced to a fine of $100 in default 2 months' imprisonment. His driving licence was ordered to be endorsed. At the hearing of the appeal the learned Deputy Public Prosecutor stated that he did not support the conviction.

There was no eye-witness to the accident. The prosecution relied on the evidence of a 13-year old youth who stated that he saw a man cross the road and then saw the man lying on the road. The man died in hospital the same day.

The learned magistrate thought fit to call for the defence though, in my opinion, the prosecution had failed to prove its case. There appears

to be a tendency among magistrates to call for the defence in what I would call "border-line" cases. Magistrates should read the provisions of section 173(f) of the Criminal Procedure Code very carefully. Under no circumstances should a magistrate call for the defence just to clear any doubt he may have in his mind. In this particular case the defence in no way helped the trial magistrate to clear any doubt he might have in his mind. On the contrary the defence helped to confuse the issue to a greater extent. The appellant stated that as he was approaching a junction he saw a motor car parked at the left side of the road facing the town. He saw a man leaning "to the side of the car's offside" whatever that may mean. The appellant sounded his horn and slowed down. The man "moved backwards" whatever that may mean. The appellant swerved his lorry to avoid hitting the man. The lorry attendant's story was quite different. He stated he saw an Indian "walking from the left side of the lorry to the other side of the road". The Indian knocked against the near-side of the lorry. The accident occurred after the lorry had passed the stationary car. There was nothing in the evidence to even show that the appellant was driving without due care and attention.

The appeal is allowed. The finding and sentence reversed and the appellant acquitted and discharged.

Appeal allowed.

Solicitors: *George & Khoo.*

G. P. De SILVA & ORS. v. CHUA YAM THONG

[O.C.J. (Suffian J.) March 23, 1962]

[K.L. — Civil Suit No. 390 of 1960]

Land laws — Joint proprietors of land — Agreement to divide land — No application to Collector to partition — Erection of houses by one joint proprietor (defendant) on portion of land allotted to him under agreement — Sales by another joint proprietor subsequently of portion of his share — Whether purchasers and original joint proprietors entitled to share profits derived from houses built by defendant.

The first and second plaintiffs and the defendant were registered proprietors of an undivided one-third share each in a piece of land. In 1953 and 1954 the defendant cut down the coconut and rubber trees on a portion of the land and erected a number of temporary houses. In 1955 the second plaintiff sold one-third of his undivided share in the land to the 3rd plaintiff and in 1956 sold another one-third to the 4th plaintiff. In an action by the plaintiffs for an account of profits derived from the houses, payment of their shares and for damages on the basis that defendant had carried through the whole operation of erecting the houses without their consent and knowledge, the defendant alleged that his building operations were confined to a portion of the land which had been allotted to him as his share under an oral agreement made with the first and second plaintiffs in 1951 and that the plaintiffs were consequently estopped.

Held: it was established by the evidence adduced by the defendant that there was an agreement in 1951 between the 1st and 2nd plaintiffs and himself under which a division of the land was made. As the defendant had erected the houses only on that portion of the land which had been allotted to him under the agreement, the claims of the 1st and 2nd plaintiffs must fail. The 3rd and 4th plaintiffs were successors in title of portions of the share of the 2nd plaintiff and were bound by the agreement. Their claims must also therefore fail.

Case referred to:—

(1) *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 140.

The following cases were also cited during argument: *Ord* v. *Ord* [1923] 2 K.B. 432; *Murugappa Chettiar* v. *Chinniah* [1962] M.L.J. 95; *A.G. to Prince of Wales* v. *Collom* [1916] 2 K.B. 193 and *Mold* v. *Whitcooft* (1859) 54 E.R. 202, 206.

CIVIL SUIT.

R. Ponnudurai for the plaintiffs.

R. Tallala for the defendant.

Cur. Adv. Vult.

Suffian J.: The land in dispute is Lot 485 in the Mukim Batu in Kuala Lumpur held under E.M.R. 5831, 1 acre 3 roods 23.8 poles in area. Many years before the war it was registered in the name of Mr. de Silva as the sole proprietor. Before his death he transferred it to his three sons and in due course they appeared on the register as the proprietor each of a one-third undivided share.

In 1942 one of the brothers sold his share to the second plaintiff.

Another brother sold his share to Mrs. Wickramanayaka. In 1951 she sold her share including the family house of the de Silvas to the defendant.

The position then was that the first plaintiff (the sole surviving de Silva's brother). the second plaintiff and the defendant were registered proprietors of an undivided one-third share each in the land.

After his appearance on the scene the defendant proceeded to erect houses on the land.

After such erection, in 1955 the second plaintiff sold one-third of his undivided share to the third plaintiff and in 1956 another one-third to the fourth plaintiff.

The position at the time of this litigation is that the first plaintiff and the defendant are registered proprietors of a one-third undivided share each, while the second, third and fourth plaintiffs are registered proprietors of one-ninth undivided share each in the land.

The complaint is that all the plaintiffs and the defendant, five persons in all. are only the registered proprietors of undivided shares in the land, the defendant in 1953 and 1954 without the consent and knowledge of the then other co-proprietors had cut down coconut and rubber trees on the land and further caused damage by removing large quantities of earth and causing two wells to be dug and soon thereafter defendant, despite protests by the then other co-proprietors, had erected a number of temporary houses occupying a major portion of the land and rented out the said premises, the defendant neglected to account for the profits derived from the houses, and the plaintiffs claim an account of such profits, payment of their shares, damages, any other relief and costs.